

There have been no additions to the record nor additional stipulations since the entry of the Board's May 30, 2003 Order. Therefore, the record remains the same as that considered by the Administrative Law Judge (ALJ) and is listed in the ALJ's January 10, 2002 Award. However, as further explained herein, the parties appear to be in agreement that the Board should also consider the ALJ's Review & Modification Award entered May 7, 2003.

ISSUES

On May 30, 2003 the Board entered an Order modifying the January 10, 2002 Award entered by the ALJ. The Board found claimant had a 30 percent permanent partial general disability and awarded 122.4 weeks of permanent partial disability compensation at the rate of \$257.46 per week and in the total amount of \$31,513.10. Claimant was also awarded 22 weeks of temporary total disability compensation at the same weekly rate totaling \$5,664.12, making the total award of disability compensation \$37,177.22.

Respondent and its insurance carrier appealed the Board's Order to the Court of Appeals raising the following issues:

1. Whether the Board of Appeals erred in finding that the claimant is entitled to a work disability when the claimant was working at a job earning 97% of his pre-injury wage and the expert testimony shows that he has the physical ability to earn 90% or more of his pre-injury wage.
2. Whether the award of work disability was properly calculated.
3. Whether the Board of Appeals erred in failing to give respondent a credit for overpayment of temporary total disability benefits that had been paid pursuant to a preliminary award that was later reversed by the Board of Appeals.
4. What is the nature and extent of the claimant's disability.¹

The Court of Appeals affirmed the Board's award of a 30 percent work disability based upon the average of the 41 percent task loss and 18.4 percent wage loss. The Court of Appeals also affirmed the Board's award of 22 weeks of temporary total disability compensation. As there was no over payment of temporary total disability benefits, the Court of Appeals affirmed the Board's denial of respondent's request for a credit. However, the Court of Appeals agreed with respondent's claim that the Board erred in calculating the award of work disability and remanded this claim to the Board with directions to recalculate the work disability award.² Specifically, the Court of Appeals said that "Kilpatric is precluded from collecting work disability payments for the weeks he worked at Key [sic] Construction and earned at least 90% of his pre-injury wage."³

¹ Appellant's (Respondent) Docketing Statement - Civil to the Kansas Court of Appeals at 5 (filed with the Division of Workers Compensation July 1, 2003).

² See *Deist v. Dillon Companies, Inc.*, No. 213,485, 1999 WL 1314825 (Kan. WCAB Dec. 30, 1999); *Edwards v. Klein Tools, Inc.*, No. 198,017 & 198,018, 1999 WL 722502 (Kan. WCAB Aug. 31, 1999).

³ Kansas Court of Appeals Memorandum Opinion at 5 (filed April 9, 2004).

Accordingly, the proper method for calculating claimant's award of permanent partial disability compensation is the only issue for the Board's determination upon remand.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In its May 30, 2003 Order the Board calculated the Award as follows:

Dallas C. Kilpatric is granted compensation from Bonanza, Inc., and its insurance carrier for a January 11, 2000 accident and resulting disability. Mr. Kilpatric is entitled to receive 22 weeks of temporary total disability benefits at \$257.46 per week, or \$5,664.12 plus 122.40 weeks of permanent partial general disability benefits at \$257.46 per week, or \$31,513.10, for a 30 percent permanent partial general disability, making a total award of \$37,177.22.

As of May 26, 2003, there is due and owing to Mr. Kilpatric 22 weeks of temporary total disability compensation at \$257.46 per week in the sum of \$5,664.12, plus 122.40 weeks of permanent partial general disability compensation at \$257.46 per week in the sum of \$31,513.10, for a total due and owing of \$37,177.22, which is ordered pain [sic] in one lump sum less any amounts previously paid.⁴

The Board recognized that because claimant's employment changed and his income fluctuated after his accident that there would be a corresponding change in the percentage of actual wage loss. And this would likewise affect the percentage of work disability to which claimant was entitled. The Board included in a footnote to the above Award the following explanation for why the Board did not separately calculate the Award to account for the various percentages of wage loss claimant experienced.

Claimant's permanent partial disability award would be limited to his percentage of functional impairment while he was working and earning at least 90 percent of his average weekly wage. But due to the accelerated pay out formula and because the compensation rate does not change, it makes no difference in the calculation of this award or in the amount due. Therefore, this award simply uses the final percentage of work disability to compute the total number of weeks of permanent partial disability compensation.⁵

Following receipt of the remand from the Court of Appeals, the Board sent a letter to counsel for claimant and counsel for respondent requesting the parties "to advise how they believe the Board's May 30, 2003 Order should be recalculated."⁶ Counsel for

⁴ Order (May 30, 2003).

⁵ *Id.* at FN 20.

⁶ Letter from Division of Workers Compensation Appeals Board to Stephen J. Jones and Nathan Burghart (May 12, 2004).

respondent submitted a brief which addressed the issue on remand. Counsel for claimant did not. Respondent's brief took into consideration an award calculation of a post award order entered by the ALJ terminating work disability benefits after July 1, 2002. Review by the Board is limited to the record presented to, and considered by, the ALJ at the time of the January 10, 2002 Award. Only the January 10, 2002 Award was appealed to the Board and it was the Board's Order modifying the ALJ's January 10, 2002 Award that was appealed to the Court of Appeals. Absent an agreement of the parties, the record for that review and modification proceeding, however, cannot be considered by the Board as it is not part of the record before the Board.

The Court of Appeals directed the Board to recalculate the award to deny claimant a work disability "for the weeks he worked at Key [sic] Construction and earned at least 90% of his preinjury wage."⁷ While the record discusses several jobs where claimant worked after leaving respondent's employment, the specific dates of each employment and the weekly wages earned at each is incomplete. Neither counsel for claimant nor counsel for respondent made an effort to distill this information from the testimony and present it to the Board in any useful manner. As the Board understands the directions from the Court of Appeals concerning the Board's task on remand, the Board is to recalculate the claimant's work disability taking into consideration each change in claimant's actual earnings during the period contained within the record. The record before the Board is the same as that presented to Judge Clark and which formed the basis of Judge Clark's January 10, 2002 Award.

What the Board has gleaned from the record is that claimant's last day of work for respondent, Bonanza was January 11, 2000. Sometime near the end of May 2000 claimant went to work at Sears earning \$5.25 per hour plus commissions. Claimant worked for Sears "for about two weeks."⁸ Claimant received no fringe benefits from Sears.

Claimant also worked for Mill-Tel installing cables and was considered an independent contractor. He started working for Mil-Tell at the end of March or first of April.⁹ No year was given. Claimant's pay was determined by the job. He testified that he averaged 55 hours a week and received no fringe benefits.¹⁰

⁷ Kansas Court of Appeals Memorandum Opinion at 5 (filed April 9, 2004).

⁸ Kilpatric Depo. (Nov. 8, 2001) at 9 and 23.

⁹ R.H. Trans. (May 15, 2001) at 15-17.

¹⁰ *Id.* at 37.

Claimant then went to work for Keystone Construction a day after leaving Mill-Tel.¹¹ He obtained the job at Keystone Construction around May or June 2001 and was there a month and a half.¹² Claimant earned either \$8 or \$8.50 an hour and received no fringe benefits. He worked about 47 hours a week and earned a weekly wage of \$376.¹³

Claimant next went to work for Rapid Brake & Muffler. Claimant testified he was off two days between Keystone and Rapid Brake & Muffler.¹⁴ He was there about two months and was paid either \$5.25 an hour or a percentage of the job. There were no bonuses or fringe benefits.¹⁵

Claimant next worked as a security guard for Pro-Security (PSI) earning \$7.50 an hour. As to when he started at PSI claimant said, "I don't know exact dates. . . thinks it was beginning 2002."¹⁶ However, he left PSI in May or June 2002 as he was offered another job that never materialized.¹⁷ Claimant did not receive any fringe benefits while at PSI.

Claimant then started working for Chesapeake Nuclear Services from sometime around the middle to end of June 2002.¹⁸ Claimant testified he was off "[a]bout two to three weeks"¹⁹ between Pro Security and when he next started working. According to claimant, he earned \$12 an hour at Chesapeake Nuclear Services. Chesapeake Nuclear Services did not offer any fringe benefits.²⁰ Claimant testified he left that job on December 20.²¹ No year was given.

The remand from the Court of Appeals which directs the Board to recalculate the

¹¹ Kilpatric Depo. (Nov. 8, 2001) at 11.

¹² *Id.* at 3,10-12.

¹³ Terrill Depo. at 15.

¹⁴ Kilpatric Depo. at 13.

¹⁵ *Id.* at 14-15.

¹⁶ Continuation of Regular Hearing by Depo. (Jan. 24, 2003) at 5.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 8.

²⁰ Kilpatric Depo. (Jan. 24, 2003) at 8-10.

²¹ *Id.* at 10.

work disability award, only mentions the weeks claimant worked at “Key [sic] Construction.” The Board presumes the Court of Appeals is referring to Keystone Construction. The Court of Appeals’ instructions are to recalculate the work disability award to preclude claimant from collecting work disability payments for the weeks he worked at Keystone Construction and earned at least 90 percent of his preinjury wage.²² However, the Court of Appeals does not state the dates claimant worked at Key [sic] Construction nor does the Court of Appeals state the number of weeks claimant “earned at least 90% of his preinjury wage”²³ while working at Key [sic] Construction nor is this information contained in the record.

The parties’ stipulated that claimant’s preinjury average weekly wage with respondent was \$386.17.²⁴ Ninety percent of that average weekly wage is \$347.55. Accordingly, claimant is precluded from receiving an award based on work disability during any weeks that his earnings exceeded \$347.55.²⁵ The record does not disclose claimant’s gross weekly earnings while employed at Keystone Construction, but based upon his purported average earnings of \$376 per week, claimant would be precluded from receiving a work disability during the entire time he was employed at Keystone Construction. The record likewise does not disclose a beginning date and ending date for that employment, only that it was about a month and one-half around May or June of 2001. Presumably, the Court of Appeals is instructing the Board to recalculate the Award to deny claimant permanent partial disability compensation for the approximately six weeks claimant worked for Keystone Construction around May and June 2001. In its original Award calculation, the Board did not set this separate calculation out because all benefits were past due and it would neither change the total amount of the Award, nor the total number of weeks of disability compensation due and owing.

In its brief to the Board, respondent submits its position as follows:

The first pertinent question is what amount of benefits the claimant was entitled to prior to the Court of Appeals’ decision. The second pertinent question is what effect the Court of Appeals’ decision has on this amount. The original award of January 10, 2002 granted the claimant a 31.5% work disability plus 22 weeks of TTD for a total award (including TTD and PPD) of \$38,752.88. That award was appealed to the Board and on May 30, 2003, the Board modified the award to a 30% work

²² “Kilpatric is precluded from collecting work disability payments for the weeks he worked at Key [sic] Construction and earned at least 90% of his preinjury wage.” Kansas Court of Appeals Memorandum Opinion at 5 (filed April, 9, 2004).

²³ *Id.*

²⁴ Award at 2 (Jan. 10, 2002)

²⁵ K.S.A. 44-510e(a).

disability but otherwise affirmed the award. The total value of the Board's award is \$37,177.22

However, during the pendency of the appeal, respondent successfully filed for a review and modification. On May 7, 2003, Judge Clark found that the claimant was not entitled to work disability benefits after July 1, 2002 and accordingly, reduced 21.23 weeks of PPD benefits from the prior award (i.e., the period after July 1, 2002). Neither party appealed the review and modification award. The total amount of benefits awarded in the review and modification award is \$33,287.00 (22 weeks of TTD and 107.29 weeks of PPD). In short, before the Court of Appeals' decision, the claimant was entitled to a total of \$33,287.00 in disability benefits pursuant to the review and modification award.

The next pertinent question is what effect the Court of Appeals' decision has on that amount? One of [r]espondent's arguments to this Board and the Court of Appeals was that the claimant should not be entitled to work disability benefits during the period that he was working for a company called Key [sic] Construction because he was earning more than 90% of his pre-injury wage during the period he was employed at Key. The Court of Appeals agreed with this argument and ruled that the claimant should not be entitled to work disability benefits for the period he worked for Key [sic] Construction. The evidence shows that the claimant worked for Key [sic] Construction for a month and [one]-half during the months of May and June, 2001, a period of approximately 6 weeks. The "bottom line" of the Court of Appeals' decision is that the claimant is not entitled to work disability benefits during this 6 week period.

Respondent submits that the only effect that the Court of Appeals' decision will have upon the case is that claimant will not be entitled to receive work disability benefits during the six week period while he was working for Key [sic] Construction in May and June, 2001. Thus, rather than owing a total of 107.29 weeks of PPD, respondent would only owe 101.29 weeks of PPD. Other than this, it does not appear that the Court of Appeals' decision will affect the total amount of benefits to which claimant is entitled.

Conclusion

As outlined above, the total award to the claimant, after deducting the period that the claimant worked for Key Construction, should be as follows: 22 weeks of TTD at the rate of \$257.46/week in the total amount of \$5664.12 and 101.29 weeks of PPD at the rate of \$257.46 for a total of \$26,078.12. Thus, the total amount of benefits the claimant is entitled to is \$31,742.24.²⁶

The ALJ's original Award of January 10, 2002, which was modified by the Board's

²⁶ Appellant's (Respondent) Brief to the Division of Workers Compensation Board of Appeals at 2 and 3 (filed June 1, 2004).

Order of May 30, 2003, was subsequently modified by the ALJ on a post award review and modification proceeding. The ALJ's Review & Modification Award provides as follows:

The Award of [c]ompensation made in favor of the [c]laimant, Dallas C. Kilpatric, and against the [r]espondent, Bonanza, Inc., on January 10, 2002, is modified as follows[.]

The [c]laimant is entitled to 22 weeks of temporary total disability at the rate of \$257.46 per week or \$5,664.12 followed by 82.29 weeks of permanent partial compensation at \$257.46 per week for a total of \$21,186.38 for a total due and owing of \$26,850.50 which was ordered paid in one lump sum effective January 10, 2002. Hereafter there is a remaining balance of 25 weeks due and owing from January 10, 2002, until July 1, 2002, at a rate of \$257.46 per week or \$6,436.50 all of which is due and owing and ordered paid in one lump sum less any amounts previously paid. The remaining 21.23 weeks of the previous award entered by this Court are hereby set aside as the [c]laimant was working for Chesapeake Nuclear Services, Inc., for a significantly higher wage than he was earning while working for the [r]espondent.²⁷

Both counsel for respondent and counsel for claimant refer to the ALJ's May 7, 2003 Review & Modification Award in their briefs to the Board. Accordingly, the Board will treat that as a stipulation that the Review & Modification Award should be added to the record and considered by the Board in this proceeding upon remand. Counsel for claimant argues that because the Review & Modification Award was not appealed it is a final award which modifies and replaces the Board's May 30, 2003 Order. As a result "the appeal of the original award is now rendered moot and should be dismissed."²⁸ The Board agrees.

Respondent filed its Application for Review and Modification on November 15, 2002. K.S.A. 44-528(d) provides ". . . that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this Section." Accordingly, the earliest effective date for any modification the ALJ made to the January 10, 2002 Award would be May 15, 2002. As this is after the May and June 2001 period claimant worked for Keystone Construction, it would appear that the post-award review and modification proceeding would have no effect on the issue before the Board in this remanded appeal of the January 10, 2002 Award. However, the ALJ's Review & Modification Award did not confine itself to the period after May 15, 2002. Although the ALJ stated "that the effective date of the modification of this Award is July 1, 2002," the Review & Modification Award calculated and provided for award of all disability benefits to which claimant was entitled from the date of accident forward. That award totaled \$33,287.00, all of which was found to be past due and was ordered

²⁷ Review & Modification Award at 3 and 4 (filed May 8, 2003).

²⁸ Letter from Stephen J. Jones to Workers Compensation Appeals Board (May 30, 2003).

paid in one lump sum. The Review & Modification Award was not appealed. It is, therefore, a final judgment.²⁹

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the appeal by respondent Bonanza, Inc., and its insurance carrier Continental Western Insurance Company of the January 10, 2002 Award entered by Administrative Law Judge John D. Clark is moot and is therefore dismissed.

IT IS SO ORDERED.

Dated this ____ day of September 2004.

BOARD MEMBER

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BOARD MEMBER

Attachment

c: Stephen J. Jones, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and Continental Western Ins. Co.
John D. Clark, Administrative Law Judge
Paula Greathouse, Workers Compensation Director

²⁹ *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P.3d 330 (2002).